

The Global Conservation Battleground: CITES, the IWC, the African Elephant and the Whale

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Environmental treaties in the modern world

Modern international environmental treaties are changing shape. Unlike older treaties, modern treaties regularly include provisions for aid to be provided to developing countries when they are asked to act in ways that benefit the developed world or other states, at cost to themselves. There is also a trend for modern treaties to include monitoring and reporting procedures, with support structures and institutional frameworks.

One of the issues this article considers is the way in which Japan and Norway appear to be attempting to use the Convention on International Trade in Endangered Species (CITES) in order to circumvent the moratorium on whaling imposed by the International Whaling Commission. Allied to this is the potential for these countries to use the international trade in ivory as a symbol and precedent for efforts to resume whaling.

To be learned from this is that international environmental treaties may have shelf-lives. CITES and the Convention for the Regulation of Whaling may well be nearing the limits of their effectiveness.

This leads to a discussion of a related issue raised: that of differing perceptions of conservation, preservation and usage of natural resources held by different international actors. The principal countries involved in the issues discussed in this paper hold markedly different ideas about conservation, the utilisation of natural resources and indeed the very concept of sustainable development itself.

The two old watchdogs: CITES and the Whaling Convention

CITES is an >old-style= Convention which does not make provision for ongoing monitoring, does not have a permanent secretariat charged with ensuring that it is operating successfully,¹ and does not make any provision for financial support of countries which are forced to act under it at financial cost to themselves. It was signed into existence at Washington in 1973, as one of a number of Conventions that followed the 1972 United Nations Conference on the Human Environment (UNHCE) in Stockholm. CITES regulates international trade and has only limited jurisdiction to look inside states and regulate their internal actions.

¹ A permanent Secretariat located in Lausanne, Switzerland oversees the application of the CITES system, but day-to-day operation is a matter for the national authorities of the parties.

CITES does appear to have been a largely successful treaty. Harland calls it >... the most active and visible instrument of international environmental law in force.⁼² And Hepworth writes that >... most parties believe that CITES works. It has direct, practical effects in the real world and, indeed, some 136 nations have decided that it is sufficiently important to merit their participation.⁼³

However, there are concerns. >After two decades,= writes Sand, >the jury is still out on CITES ... The views of commentators vary, although most are favourable.⁼⁴ And de Klemm notes that >[m]ore than two decades after the original Convention, only a small number of the contracting parties have ... enacted specific and relatively comprehensive legislation to implement it.⁼⁵

>Successful as the Convention may be in providing for strict controls on trade in endangered species and their derivative products, it is at least arguable that the stated aim of CITES in terms of the protection of endangered species against over-exploitation through international trade controls implicitly acts to legitimise such trade in fact.⁼⁶

CITES is not designed in itself to protect or conserve endangered species, with the possible exception of species threatened with extinction and listed in Appendix I. Appendix I species are not available for commercial trade and are thus ostensibly protected against trade.

>Although the CITES permit system is the basic means to control international trade, in common with many international instruments it does not provide for a detailed system of rules, relying instead on the discretion of its States Parties to interpret and implement their own permit procedures. This lack of detail in its primary rules has been criticised as a weakness in the CITES regime. The major flaw in the permit system is its lack of emphasis on importing state controls, especially in the form of import permit requirements.⁼⁷

The increasingly influential position of developing countries within the CITES decision-making process can be seen as an example of the >democratising= of international environmental treaty regimes, as such treaties seek to accommodate many different perspectives and value orientations.⁼⁸

The African elephant is listed on Appendix I of CITES, as are all large cetaceans; with the exception of the West Greenland population of minke whales, which is in Appendix II.⁼⁹

The International Convention for the Regulation of Whaling (AICRW \cong) is the Convention signed into being in Washington in 1946 by the whaling nations themselves as a self-regulating body to set quotas for whales to be caught. It came into force late in 1948 and established the International Whaling Commission (AIWC \cong). The IWC originally existed only to provide for the

² D Harland Killing Game: International Law and the African Elephant London: Praeger Publins, 1994 12.

³ R Hepworth > The Independent Review of CITES= (Nottingham Conference - 1997). Today there are more than 140 States Parties.

⁴ P H Sand >Whither CITES? The Evolution of a Treaty Regime in the Borderland of Trade and Environment= (1997) 8 EJIL 29 35.

⁵ C De Klemm Guidelines for Legislation to Implement CITES (IUCN Environmental Policy and Law Paper) Cambridge: IUCN,1993 5.

⁶ D M Ong >The Convention on International Trade in Endangered Species (CITES, 1973): implications of recent developments in international and EC environmental law= Journal of Environmental Law Vol.10 No.2 1998 294.

⁷ *Ibid* at 297.

⁸ *Ibid* at 314.

⁹ P H Sand *op cit* at 41 fn 70.

proper conservation of whale stocks and thus make possible the orderly development of the whaling industry. The stated goal of the IWC is to protect all species of whales from over-exploitation. This is not, however, a protectionist philosophy. The goal is the utilitarian one of gaining maximum benefit from the sustainable usage of a natural resource. It has now placed a moratorium on whaling only because sufficient countries opposed to whaling have joined and now outnumber the countries in favour of whaling.

In 1982 the IWC set a moratorium on whaling in place, by dint of setting a nil quota for the total allowable catch. This amendment came into force in February 1983. The moratorium was extended in 1990 and has been extended at every meeting since then.

Norway objected formally in 1982 to the IWC=s indefinite imposition of a nil quota and is therefore entitled to hunt commercially and does so. Norway maintains this objection. Japan did not object as Norway did, but takes whales commercially under the pretext of >scientific research=, which is allowable in terms of IWC rules. In fact, all of Iceland, Norway and Japan have at one time or another caught whales for so-called >scientific research=. Member nations can set their own quotas for these programmes without consulting the IWC. Member states then issue permits to their own nationals to meet the quotas.

Japan officially objected to the creation of a sanctuary for whales in the Southern Ocean in 1994, and is thus not obliged to recognise it.¹⁰

Iceland ceased to be members of the IWC in 1992 and so have not recently exerted influence within that body. In 2001 Iceland sought to rejoin, in order to increase the strength of the pro-commercial whaling bloc within the IWC. The IWC allowed Iceland to rejoin, but voted not to grant Iceland voting rights as the country refused to recognise the moratorium on commercial whaling.¹¹

The IWC does have a >Scientific Committee= which is intended to monitor the condition of whaling stocks worldwide and make regular advisory reports based on scientific evidence. This committee meets two weeks before every IWC meeting.

Enforcement of the Treaty, however, relies largely on the will of States Parties themselves.

CITES and the African Elephant

In 1989 when the African elephant was placed on Appendix One of CITES, and thus given complete protection from all trade, this was done against opposition by Southern African countries and no provision was made for financial compensation.

Effectively, therefore, the developing countries in Sub-Saharan Africa are subsidising the developed countries in the North. In order to satisfy the current trend in developed countries to stigmatise the use of elephant products, developing countries with well-managed elephant populations are foregoing a potentially lucrative source of revenue.

¹⁰ First proposed by France in 1992, this sanctuary was accepted by the IWC at its meeting in Mexico in May 1994. Only Japan voted against the proposal. Norway did not cast a vote. See *African Wildlife* Vol.48, No.4 July/August 1994.

¹¹ >For watching or eating?= *The Economist* July 28th 2001 at 42.

In June of 1997 the writer was in Harare at the time of the 10th CITES Conference of Parties. It was an interesting place to be, to observe the hysteria and hype that surrounded the issue of resuming trade in elephant products. Approximately 75 proposals to uplist or downlist various species were put forward; however, the main issue in the public eye at the Conference was that of the African elephant and its possible downlisting. The line taken by Southern African countries was fervently in favour of downlisting. Chem Chemutengwere, the Zimbabwean Minister for the Environment, asked >[for h]ow long are our people to suffer?= And Zimbabwean President Robert Mugabe suggested that animals had for too long not been expected to have to pay their way. Although emotional, comments such as these indicate deep resentments. Zimbabwe certainly felt hard done by and South Africa, Namibia and Botswana took the same line.

Norway and Japan supported the Southern African countries, arguing that countries have an inalienable right to the sustainable utilisation of their natural resources . Few other developed countries gave such support, and it is worth considering that Norway and Japan had an agenda other than altruistic concern for the Southern African viewpoint.

International trade in endangered species is conducted mainly between developing countries where these species are found, and developed countries, including newly industrialising countries such as China, where the markets for these species are located and their derivative products are destined.¹²

There is obviously more to be said for a country=s right to profit from natural resources found within its borders than for a country=s right to utilise resources from the high seas, or >global commons=, against the wishes of other states. However, the principle of sustainable development remains the same and, for the pro-whaling states, downlisting of the elephant would provide a useful precedent.

In Harare in 1997 South Africa proposed a compromise arrangement, which was initially turned down by the CITES COP. However, out of this refusal came the formation of an inter-governmental working group which put forward amended proposals. Put to a secret ballot, these proposals were adopted with the necessary two-thirds majority.¹³

The elephant was not downlisted worldwide, but a >once-off= test auction of ivory was approved. The sale was to be in the total amount of 59.1 tons (of a combined stockpile of more than 150 tons), from the three countries; to be sold only to Japan; to be used only for the purpose of the manufacture of *hanko* (personal seals); and to take place only after a twenty one-month moratorium; and after an assessment by a monitoring/investigating committee that was to be set up. This committee was to be called MIKE - AMonitoring Illegal Killing of Elephants=.

This compromise deal did not go through without opposition and was eventually adopted after the European Union abstained - allegedly >in frustration=.

¹² D M Ong *op cit* 297.

¹³ J Gowans >Africa=s View Prevails= *African Wildlife* Vol.51, No.4 July/August 1997 at 14.

As Ong writes: >Under Article XV(1)(b) of CITES, the proposed amendment to the African elephant=s status under Appendix I needed a two-thirds majority of the parties present and voting.... after intensive lobbying by the three sponsoring states - Namibia, Botswana and Zimbabwe - the African elephant populations in these three countries only were moved from Appendix I to II by an overwhelming majority of the countries represented at the Tenth CITES COP meeting in Harare, Zimbabwe, with 76 countries voting in favour, 21 against and 20 abstaining.^{=¹⁴}

Many of these restrictions were glossed over in media reports, however, and the word appears to have gone out immediately that restrictions had been lifted. A few months later, while working in a safari lodge in the Lower Zambezi National Park, Zambia, the writer was informed that poaching of elephants had increased in that country almost immediately after the CITES Conference ended.

South Africa in 1997 appeared appeared ambivalent about dealing in elephant products, but did propose to investigate dealing in rhinoceros products. Unlike Botswana, Namibia and Zimbabwe, which have large elephant populations (100 000 plus in the cases of Botswana and Zimbabwe) South Africa has a relatively small elephant population - approximately 17 500. South Africa now feels, however, that it can profit by trading in both rhino and elephant products. It has a sizeable and, it believes, sustainable white rhinoceros population. The country also has large quantities of stockpiled ivory and rhinoceros horn.

Rhinoceros horn is valued in Yemen particularly, where it is used in the manufacture of ceremonial dagger handles. It is valued also in Taiwan and China, where it is believed to have medicinal properties for the alleviation of fever - and also for alleged aphrodisiacal properties. The South African view is that the money raised from such trade could successfully be ploughed back into conservation.

At CITES COP 10 in Harare, South Africa proposed being allowed to investigate re-opening trade in its stocks of white rhinoceros horn. In an open plenary session vote, this proposal was defeated by one vote - with European Union countries abstaining. However, the vote was not strictly necessary and thus of academic interest only - South Africa being within its rights at any COP to put forward a new proposal.

In 1999 the proposed auction of ivory (by Botswana, Namibia and Zimbabwe) did in fact go ahead, despite no proper report having been put forward by MIKE and despite evidence that poaching had in fact increased.

It seems, though, that the auction itself was successful - well handled as a showcase, the ivory was correctly sealed and dye-marked. An amount of approximately US\$5-million was apparently received from the auction, a substantial amount of which is supposed to be earmarked for elephant conservation.^{=¹⁵}

There are, however, disturbing reports of increases in poaching. Kenya wants to reinstate the elephant populations of Botswana, Namibia and Zimbabwe to Appendix I. >Since the stockpile sales last April [1999], poaching has surged in Tanzania, Zimbabwe and Kenya. In Tsavo West

¹⁴ *Ibid* at 302.

¹⁵ Report of 42nd Meeting of CITES Standing Committee, Lisbon, 28 September 1999, Doc.SC.42.10.2.1

national park, a popular Kenyan tourist spot, poaching has soared by 500%, while border prices for illegal ivory have also risen dramatically. Nationwide, 67 elephants were illegally killed last year, while 13 poachers were arrested and 10 shot. A Selling the stockpiles has sent a message to poachers across Africa that it will soon be business as usual, ¹⁶ Rotich [Nehemiah, director of the Kenya Wildlife Service] warns.

¹⁶ P Ghazi >Ivory towers= in *The Guardian* 8 March 2000 5.

In October 1999 a shipment of 700 kilograms of ivory belonging to a North Korean diplomat was seized by Kenyan customs officials, on its way out of the country. Two months before that Kenya Wildlife Service Officials had seized 350 kilograms of ivory (representing at least 23 elephants) in Maralal, Kenya.¹⁷

At the CITES 2000 Conference of Parties (COP 11) in Nairobi, Kenya, the issue was again debated and a decision was taken on downlisting of the elephant. The South African elephant population was downlisted from Appendix I to Appendix II, on condition that no international trade would take place until after COP 12 (due to be held in Santiago, Chile in November 2002).

At COP 9 in 1994, South Africa had in fact already managed to achieve the downlisting to Appendix II of the South African population of the southern white rhinoceros, subject to an annotation which allowed only for the international trade in live animals to appropriate and acceptable destinations, and for hunting trophies.

Rhinoceros horn is a different issue, of course. Trade in rhinoceros products is not susceptible to the same degree of Western consumer pressure as is ivory. The ban on elephant products was successful largely because it was supported by the United States and Europe, which had both previously been large consumers. Rhinoceros horn has never been a popular trade product in the West, however. Its market has always been in the East (particularly in Taiwan, China and Yemen) and the demand has not been curtailed by the CITES ban on trade.

There is virtually no market in Norway for ivory, and ultimately the trade in ivory cannot be seen as being in itself of crucial importance in Japan's eyes either. The quantities of ivory which Japan is going to import legally under CITES supervised arrangements are not of great significance. The African elephant is, however, of importance to Japan as a symbol and as a precedent in international law.

In many ways the ivory trade is symbolic of conflicting interests that are the subject of much controversy at meetings of the CITES Conference of Parties.

>The controversy surrounding the issue of the upgrading of the African elephant [in 1989] was merely a harbinger,= suggests Ong, >for a wider and even more acrimonious debate over the appropriate environmental conservation paradigm to be employed by the CITES regime for the future - sustainable use or preservation of species. Within this wider debate, the southern African elephant range states and Zimbabwe especially have emerged as the leading proponents of the sustainable use paradigm, which emphasises the goal of using living resources to meet both human and ecological needs, and asserts that in many cases wildlife can best be conserved by exploiting it for economic gain.=¹⁸

The IWC, CITES and whaling

¹⁷ D Gough >Kenyan customs on alert as ivory seizures grow= in *The Guardian* 1 November 1999 14.

¹⁸ D M Ong *op cit* 300.

At CITES COP 10 in Harare in 1997, Japan proposed to repeal a long-standing CITES resolution dating from 1979 in which the CITES Parties had supported the IWC by agreeing not to issue any import or export permit for any species protected from commercial whaling by the IWC. This proposal was opposed, by the U.S. and others, on the ground that the IWC has never withdrawn its request for support from CITES in enforcing the moratorium on commercial whaling.¹⁹

A feature of CITES COP 10 that did not receive the attention it perhaps deserved is that, at the final voting round of the Conference, a proposal by Norway to downlist the Minke whale from Appendix 1 received more votes in favour than against. However, it did not receive the two-thirds majority needed for a successful downlisting proposal to be adopted. Japan then withdrew its similar proposal to downlist Bryde=s whales.

Japan and Norway in fact submitted five separate proposals for downlisting specific whale stocks from Appendix I to II, which would have allowed international commercial trade. All of the votes were by secret ballot and none were adopted. The proposals were in respect of the Eastern Pacific Grey Whale, the Okhotsk Sea-West Pacific Minke Whale, the Southern Hemisphere Minke Whale, and the Western North Pacific Bryde=s Whale. (Japan); and the Northeast Atlantic and North Central Atlantic Minke Whale (Norway).²⁰

What Japan and Norway appear to be doing is playing off the IWC and CITES against each other. As CITES holds its Conference of Parties every two to three years and the IWC meets annually, this is easy enough to do.

Norway hopes to resume commercial whaling at the rate of approximately 1000 minke whales every year. Japan and Norway push for such a resumption at every meeting and there is frustration building up. They argue that the decision should be based on scientific evidence and that the evidence currently extant bolsters their case for resuming commercial whaling.

It has been suggested, for example, that the increasing abundance of the minke whale in the Antarctic Ocean is driving the blue whale from its diet of krill. If this theory were to become substantiated, there would be an obvious dilemma for animal welfarists in the face of potential conservation-based calls for a minke whale cull.²¹

At CITES COP 1, Norway pushed again for a downlisting of the minke whale. On the last day of the Conference, Norway even called for a reopening of the debate and amended its proposal with further DNA-based identification strictures to ensure that trade was undertaken only with countries where such identification systems were implemented. Several delegations opposed the proposal, arguing that downlisting the minke whale would amount to resuming commercial whaling. The proposal was voted on in secret ballot and again failed to reach the required two-thirds majority for downlisting. Once more, however, votes in favour outnumbered votes against - 53 votes being cast in favour of the proposal, with 52 against and 8 abstentions.²²

¹⁹ S S Lieberman >CITES COP 10: The Ups and Downs= US Fish and Wildlife Service www.fws.gov 21-10-1997.

²⁰ *Ibid.*

²¹ S R Harrop >The Dynamics of Wild Animal Welfare Law= in *Journal of Environmental Law* Vol.9 No.2 1997 288.

²² www.iisd.ca/cites/cop11.

In 2001, at the IWC meeting, Resolution 2001-5 (the >Resolution on Commercial Whaling=) expressed concern that >the Government of Norway, having lodged a reservation to the CITES Appendix I listing of whales, has announced its intention to resume international trade in minke whale products despite the decision by the CITES Conference of Parties in 2000 to support the continued listing of minke whales on Appendix I=. Resolution 2001-5 then >requested= that the Norwegian government issue no export permits for whale products, >called upon= the same government to >halt immediately all whaling activities under its jurisdiction=, and >instructed= that a copy of the Resolution be forwarded to the CITES Secretariat.²³

In November 2000 the World Wide Fund for Nature (WWF) accused Japan of targeting developing countries to try to win votes to secure the reversal of the IWC=s moratorium on whaling. The WWF suggested that Caribbean countries in particular are receiving offers of development aid in return for votes at the IWC.²⁴

Japan is attempting to garner votes from both IWC voting parties and CITES Contracting Parties by extending offers of aid packages to developing countries. In the past this has been covert. In the mid-1980s, for example, Japan was embarrassed after it was discovered that they had put undue pressure on the Seychelles to back Japan=s viewpoint at the IWC.²⁵ However, Japan is currently fairly open about this policy - admitting that they hope to persuade sufficient countries to back their stance. To this end, Japan has put millions of dollars of foreign aid into the economies of nations such as St Vincent, St Lucia, Grenada, the Dominican Republic, Antigua and the Solomon Islands.

The irony of this approach, of course, is that it is because of the presence on the IWC of non-whaling countries (such as Austria and Switzerland) that the anti-whaling bloc managed originally to gain a positive vote for the present moratorium on commercial whaling.

At the 53rd Annual Meeting of the IWC, July 2001, one of the Resolutions passed was clearly aimed at this policy of Japan=s. Resolution 2001-1 (the >Resolution on Transparency Within the International Whaling Commission=) noted that the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the United Nations Charter stipulates that: ANo state may use or encourage the use of economic, political, or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind=. This noted, the Resolution went on to A[s]tress[] in particular the importance of adherence to the requirements of good faith and transparency in all activities undertaken by the IWC and in all activities by Contracting Governments in respect of their involvement with the IWC ...=. The Resolution then A[e]ndorses and affirms the complete independence of sovereign countries to decide their own policies and freely participate in the IWC (and other international forums) without undue interference or coercion from other sovereign countries²⁶.

²³ Resolution 2001-5. 53rd Annual Meeting of the International Whaling Commission. (www.eelink.net/~asilwildlife).

²⁴ Sapa-AFP 17 November 2000 (www.news24.co.za/News24/Technol...e_Nature)

²⁵ D Day *The Whale War* London: Grafton, 1992 127-131.

²⁶ Resolution 2001-1, 53rd Annual Meeting of the International Whaling Commission, (see www.eelink.net/~asilwildlife)

In September 2000, Japan announced that it would during this year add 50 Bryde=s whales and 10 sperm whales (neither of which species has been hunted since 1986) to its annual catch of approximately 540 minke whales. At time of writing of this article (November 2000) Japanese whaling ships in the Antarctic and North Pacific had already taken five sperm whales.²⁷ The sperm whale is, of course, the species of >Moby Dick= fame and, as Severin writes, >[h]e is the whale which forms our popular image of his species, if not of all great whales. Chief protagonist in a classic of American literature, he is embedded in the awareness of millions of readers in the English-speaking world and, in translation, can be found on the book lists of schools and universities from Western Europe to Japan.=²⁸ Japan=s actions must be seen as an effort to keep the issue topical and to escalate debate at forthcoming IWC meetings and CITES Conferences.

Japan has, in addition, recently decided to allow fishermen to kill and sell whales caught by mistake in their nets.²⁹ In response, the IWC (Resolution 2001-4, the >Resolution on the Incidental Capture of Cetaceans=) has expressed concern and recommended that there should be no >commercial exchange of incidentally-captured whales for which no catch limit has been set by the Commission=, and that should a whale caught incidentally be >subject to a catch limit awarded under the RMP [Revised Management Plan], and the sovereign government wish to permit commercial exchange for that whale, then: (i) A DNA sample must be forwarded to the appropriate diagnostic register; (ii) The incidental capture must be counted against the overall quota for that species or stock.=³⁰

In response to Japan=s actions, the United States has sought to prevent Japanese fishermen from entering American waters.³¹ Britain has likewise banned Norwegian whale-survey ships from its waters.³²

The elephant, the whale and divergent approaches to conservation

The elephant issue highlights two different approaches that can be taken to conservation. The >Kenyan model= attempts to maintain elephant populations by ensuring absolute protection from poachers and by banning all trade in elephant products. The approach of the Southern African countries is to manage elephant populations actively, culling animals to provide sufficient habitat, sharing profits with local people and ploughing profits back into conservation.

>Zimbabwe=s conservation policy,= it has been suggested, >does not seek to make a profit out of wildlife but makes the animal self-sustaining; in an era of tight fiscal constraints, it is a lesson for the rest of the world.=³³

The whale exemplifies the same divergence. >To the whaling nations,= writes Bowman, >the relatively plentiful stocks of certain cetacean species has meant that there could be no legitimate justification for refusing to sanction the resumption of commercial whaling. To others in the international community, however, the real need is to prevent not only the extinction of cetacean

²⁷ Sapa-AFP *Supra* fn 19; >Whale story=s deadly new turn= 13 September 2000 (www.greenpeace.org/~oceansas/whaling/whaleday.html).

²⁸ T Severin *In Search of Moby Dick* London: Abacus, 1999 13.

²⁹ >For watching or eating?= *The Economist* July 28th 2001 at 42.

³⁰ Resolution 2001-4. 53rd Annual Meeting of the International Whaling Commission (see www.eelink.net/~asilwildlife).

³¹ *Ibid.* From September 2000.

³² *Ibid.* From July 2001.

³³ A Mutandwa >Face to Face= May 1992.

species, but also the death and suffering of individual sentient and highly intelligent creatures.^{=³⁴}

Sovereignty

It can be argued strongly that there are certain issues which must transcend national sovereignty, being of extreme importance to the global community. The protection of biodiversity in rainforests, overfishing of the oceans, and the future of important species such as the elephant and the rhinoceros must be leading examples of these.

³⁴ M Bowman >The Nature, Development and Philosophical Foundations of the Biodiversity Concept in International Law= in C Redgwell & M Bowman (eds) *International Law and the Conservation of Biological Diversity* Kluwer Law International, 1995 5.

>[R]ecent international approaches to species conservation,= posits Ong, >address a wider range of issues than CITES and primarily focus on habitat protection, despite the constraints that the Aterritorial imperative of national sovereignty over most of the world=s biological resources traditionally impose on these new regulatory regimes.^{=³⁵}

On the other hand, Nollkaemper suggests that >[w]ith a seemingly schizophrenic persistence, states simultaneously pursue policies to protect forests, animals, and ecosystems located in the territory of other countries on the one hand, and support a legal system that protects states= sovereign rights to determine for themselves whether or not to protect such values, on the other.^{=³⁶}

Indigenous hunting

At present, certain indigenous populations, in the U.S., Greenland and Russia, for example, are exempt from the IWC Commission moratorium on whaling. Japan and Norway are arguing that their indigenous coastal populations should likewise have the right to whale.

Norwegian whaling is largely coastal-based. The whalers use adapted fishing trawlers rather than purpose-built factory ships. Coastal communities pass whaling licences down through families for generations and hunt whales seasonally. Eating whale meat and fishing in whale-rich waters, it has been suggested, are >intrinsic parts of the self-declared Norwegian cultural soul=. The fishing communities are able to argue in favour of whaling from a powerful political lobby.^{³⁷}

Japan and Norway are arguing for a lifting of the ban on small-scale coastal whaling off their coastlines for >cultural and subsistence reasons=. But there are fears within the anti-whaling bloc in the IWC of a >knock-on= effect. Also, the Soviets discredited this type of whaling in the early 1980s when they were found to be whaling for >subsistence and cultural reasons= in order to feed minks for their fur trade.^{³⁸}

³⁵ D M Ong *op cit* 295.

³⁶ A Nollkaemper >The Legality of Moral Crusades Disguised in Trade Laws: An Analysis of the EC ABan= on Furs From Animals Taken by Leghold Traps= in *Journal of Environmental Law* Vol.18 No.2 1996 237.

³⁷ K Toolis >Eat it or save it?= *Mail & Guardian* 30 November 2001 p.38-39.

³⁸ D Day *op cit* at 93-98.

The Makah Native Indian tribe of Washington State in the U.S. has been given permission to resume whaling for five years from 1998 - at the rate of four grey whales per year.³⁹ The IWC allows for this, in addition to an average 120 grey whales taken annually by Russian natives in the Chukotka region of Siberia.⁴⁰ Alaskan Eskimos are also permitted to take an average of 56 bowhead whales every year.⁴¹ Whales are also taken in places such as Greenland, St Vincent and The Grenadines.

In international law, Japan and Norway would appear to have a good case for the resumption of coastal whaling.

In 2001 the IWC passed Resolution 2001-6 (the >Resolution on Japanese Community-Based Whaling=) which >recalled= that >the International Whaling Commission has repeatedly recognised the socio-economic and cultural needs of the four community-based whaling communities in Japan and the increasing distress to these communities which has resulted from the whaling moratorium=. The Resolution further >noted= the >widespread recognition in various UN covenants, conventions, and other documents, of the importance for communities to continue customary resource use practices on a sustainable basis=. The Resolution concluded by >reaffirming= the >Commission=s commitment to work expeditiously to alleviate the distress caused by the cessation of minke whaling to the communities of Abashiri, Ayukawa, Wadaura and Taiji.=⁴²

Valuing the environment.

It is currently difficult to argue in economic terms against the Southern African position in regard to exploitation of elephant and rhinoceros products, and also against the Japanese and Norwegian position in respect of whaling. This is because set against the tangible benefits to the countries= economies and conservation efforts is an intangible - the value of the elephant as a symbol which can attract international tourism and goodwill, and as a symbol of conservation. And the value of the whale and the elephants as creatures with inherent rights to life and as symbols of conservation and environmental protection.

This point goes to issues of how we set about weighing intangibles when doing cost-benefit analyses in the environmental field.

>African countries,= it has been suggested, >must reconcile the tension between the incentives to preserve elephants and the incentives to reap value from dead elephants. Live elephants can generate substantial tourism revenue and produce additional elephants. Substantial value can also be derived, however, from elephant products.=⁴³

The value of animal species to their ecosystems must also be considered. The elephant has often been described as a super-keystone species . It is truly the landscape architect of the African bush and many physical and biological aspects of its habitat are dependent on its continued

³⁹ N Nuttall >Indian tribe is allowed to kill whales again= *The Times* 24 October 1997.

⁴⁰ >Aboriginal Whale Quotas Set= - Envirolink News Service - (newsdesk@envirolink.org) 26 October 1997.

⁴¹ *Ibid.*

⁴² Resolution 2001-6. 53rd Annual Meeting of the International Whaling Commission. (See www.eelink.net/~asilwildlife.)

⁴³ A J Heimert >How the Elephant Lost His Tusks= in *The Yale Law Journal* Vol.104 1995 1473 at 1480.

presence. The fight to save the elephant can be seen, therefore, as a fight to save the elephant=s environment too.

And in a world with oceans under so much pressure from rapacious fishing and pollution, the role of the whale too needs to be considered carefully. In both environments there is a very strong case for the precautionary approach to be followed before potential keystone species are removed.

The views of states, inter-state bodies and interested non-affiliated bodies vary on the state of world fisheries. The UN Food and Agriculture Organisation (FAO), for example, believes that stocks are presently Arelatively stable=. However, distortion of figures by, for example, overinflated Chinese catch figures has been alleged. It has also been pointed out that local fisheries worldwide are struggling, if not collapsing, despite apparent increases in the total global fish catch.⁴⁴

Writing in 1985, Lyster calls habitat degradation the single most important cause of species extinction, and points out that >[t]here is no worldwide treaty for the protection of habitats of endangered species or of endangered ecosystems.= >Such a treaty,= he argues, >would help fill in gaps left by regional treaties and, more significantly, would greatly increase cooperation between [the] developed and [the] developing worlds.=⁴⁵

The Convention on Biological Diversity

As it becomes apparent that CITES may be reaching the limits of the protection that it can offer to species, so newer treaties must be looked to. The 1992 Convention on Biological Diversity is perhaps the best example of new approaches to the concluding of environmental treaties.

The Preamble to the Biodiversity Convention affirms that states have Asovereign rights over their own biological resources=. However, it also affirms that the conservation of biological diversity is Aa common concern of humankind= and that states are Aresponsible for conserving their biological diversity and for using their biological resources in a sustainable manner=.

The Biodiversity Convention goes beyond CITES by establishing objectives for the comprehensive preservation of biological diversity, reflecting objectives of the 1980 World Conservation Strategy. The Biodiversity Convention has three objectives: Athe conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources ...=.⁴⁶

The Biodiversity Convention goes further than CITES also by seeking to protect ecosystems and habitats, making provision for identification, monitoring and protection of areas important to species that might be endemic, threatened, migratory or have scientific, cultural, economic, social or evolutionary importance.

⁴⁴ >Fishy figures= *The Economist* 29 November 2001 (www.economist.com) quoting R Watson and D Pauly, University of British Columbia, and A Rosenberg, University of New Hampshire.

⁴⁵ S Lyster International Wildlife Law Cambridge: Grotius PubIns, 1985 303.

⁴⁶ Article 1 of the 1992 Convention on Biological Diversity, Rio and Nairobi.

As to the ICRW, it has been said of it that it >... has become too far removed from the realities of current political needs to meet adequately the needs of whale conservation. The reason that it has survived in its current anachronistic form is simply that its members are divided into two deadlocked camps: pro-whaling and anti-whaling countries. Any change in the balance between them may cause the machinery to collapse and so it remains static and antiquated.=⁴⁷

⁴⁷ G Rose & S Crane >The Evolution of International Whaling Law= in J Kirkby; P O=Keefe & L Timberlake *The Earthscan Reader in Sustainable Development* London: Earthscan Publications, 1995 34.

Newer treaties are starting to include mechanisms designed to facilitate improved compliance. >It has become apparent in recent years,= writes Bowman, >that the prospects of success of any treaty which has the protection of the environment as its principal objective will depend to a considerable extent upon the effectiveness of the institutional mechanisms which it incorporates.=⁴⁸

>A crucial lesson,= Bowman continues, >to be derived from the whole experience of the evolution of environmental law since the 1960s, brought home with particular force in the forum of the Rio Earth Summit [the United Nations Conference on Environment and Development - 1992] is that paper obligations in the area of nature conservation mean nothing unless backed by hard cash.=⁴⁹

As can be seen from the changing provisions of newer treaties, it appears that this lesson has been learned. Governments in the developing world have become aware that their possession of natural resources gives them a strong hand, when demanding that treaties in regard to natural resources contain financial aid provisions. As such, they are unlikely today to conclude treaties that do not provide for such aid. And developed countries and non-governmental organisations are turning away from deterrence as an inducement.

Harrop has suggested that >... as animal welfare legislation is seen to falter in the face of a new and comprehensive multilateral trade regime it may [become] mandatory to look to international instruments and standards in order to redress the imbalance.=⁵⁰

The watchdogs in 2002

In 2002, the IWC will hold its annual meeting in May. The host country is Japan, and the port city from which the whaling fleets leave - Shimonoseki - has been chosen as the venue. It seems likely that the meeting will witness some of the most determined efforts yet made to resume commercial whaling - particularly if states such as Namibia and Iceland receive the right to vote.

In November 2002 CITES COP 12 will be held in Santiago, Chile. Southern African countries are preparing themselves for another assault on the effective ivory trade ban. Namibia, Botswana and Zimbabwe may not yet be ready to argue for another auction sale, but South Africa is currently drafting a proposal for amendment of the annotation to the elephant=s Appendix II downlisting. South Africa hopes to gain the right to sell most (27 971.25 kg) of its current stockpile (32 113.24 kg) held in the Kruger National Park.

South African National Parks (SANP), supported by the Department of Environmental Affairs and Tourism (DEAT), argues that gradual reductions in South African government funding of SANP has >left the organisation suffering from budgetary deficiencies which could be considerably redressed should the current legal stockpile of ivory be sold.= >Revenues,= claim SANP and DEAT, >would be used in the interest of elephant conservation.=⁵¹

⁴⁸ M J Bowman >The Ramsar Convention Comes of Age= (1995) 42 Neths ILR 1 33.

⁴⁹ *Ibid* at 39.

⁵⁰ Harrop *op cit* at 301.

⁵¹ Draft Proposal 2, CITES COP 12 Workshop, Pretoria, 15 March 2002.

The South African proposal had not been concluded at the time of writing, but will probably suggest that the sale of ivory be >subjected to conditions similar to those applied to the governments of Botswana, Namibia and Zimbabwe decided at COP 10.=⁵² These conditions are likely to include strictures such as that whole tusks (marked and registered) only will be exported; that confiscated ivory (or ivory of unknown origin) will not be exported; that only countries meeting certain conditions (as set by CITES) will be eligible to purchase ivory; that the export of ivory will take place through a single government-controlled centre; and that all net revenues from the sale of ivory will be used for projects that promote the conservation of elephants.⁵³

South Africa will also propose that the 1994 annotation to the Appendix II listing of the white rhinoceros be altered, to allow for the legal trade in all rhinoceros products. However, the proposal is likely to be that the amendment be made subject to an initial zero quota.⁵⁴

The current South African approach to sustainable use of natural resources can be seen in the following extract from the Draft Proposal: >[t]he ban on all international trade in rhinoceros products introduced in 1977 has failed to provide significant protection to rhinoceros populations in the wild. In fact, such a ban may even be counter-productive in that it prevents the full benefits of wise use of the resource accruing to rhinoceros owners, while rewarding the illegal operators and possibly stimulating poaching as the availability of the resource decreases.=⁵⁵

In conclusion

In 1999 the IWC issued a Resolution recognising that it has not yet completed the necessary measures to ensure that commercial whaling catch limits are not exceeded, that whale stocks can be adequately protected, and that all whaling by IWC member countries is brought under effective IWC monitoring and control. With this Resolution, the IWC reaffirmed the importance of its relationship with CITES and advised CITES once again that zero catch limits are still in force for all species of whales managed by the IWC.⁵⁶

By the time of the July 2001 IWC Meeting in London, the IWC (or at least the majority of States Parties within it) clearly felt the need, however, to entrench its position. In Resolution 2001-9 (the >Proposed Resolution on Interactions Between Whale and Fish Stocks=), the IWC described itself as >the universally recognised international organisation with competence for the management of whale stocks=.⁵⁷

Until such time as the Biodiversity Convention and other new treaties have proved to be effective in reconciling the widely divergent approaches to conservation held by important international actors, there will be tension between the protagonists of preservation and those who advocate sustainable use. In international law, this tension will be most visible in the inadequacies of those treaties through which countries currently seek to express their environmental views.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ Draft Proposal 3, CITES COP 12 Workshop, Pretoria, 15 March 2002.

⁵⁵ *Ibid.*

⁵⁶ >Resolution on Cooperation Between the IWC and CITES= - 1999-6 IWC/51/43

⁵⁷ Resolution 2002-9. 53rd Annual Meeting of the International Whaling Commission (See [www.eelink.net/~asilwildlife.](http://www.eelink.net/~asilwildlife/))

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